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Job Security in the United States: Some Reflections on Unfair Dismissal and Plant Closure Legislation from a Comparative Perspective

William B. Gould IV

Stanford Law School, wbgould@stanford.edu

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Job Security in the United States: Some Reflections on Unfair Dismissal and Plant Closure Legislation from a Comparative Perspective

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The problem of job security has been addressed by the industrialized countries in the West and Japan with increased frequency in the post World War II period. Promulgated in 1982, the International Labor Organization's Termination of Employment Convention,¹ which provides some measure of job security for dismissed employees, high-

* Charles A. Beardsley Professor of Law at Stanford Law School; Co-Chairman of the California State Bar Ad Hoc Committee on Wrongful Discharge and Termination At Will.

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1. *Termination of Employment at the Initiative of the Employer*, International Labour Conference, 68th Session, Reports V(1) & (2) (1982).

lights the significance of the issue. And, the matter of individual dismissals of workers, in particular, principally for disciplinary reasons — long ago addressed by comprehensive unfair dismissal legislation in other industrialized countries — has become both a centerpiece of industrial relations legal conflict in the 1980's in America and a problem that will not disappear in the coming decades.

Protection of jobs is also important to what Europeans refer to as collective dismissal and regulate through job protection legislation — the layoff of large numbers of employees for economic reasons. A growing number of states in this country have enacted plant closure legislation which requires notification of closing, information to be provided to employees, or the award of severance benefits to assist in relocation. President Reagan vetoed the same kinds of legislation at the national² level when it was part of an omnibus trade bill and Congress considered the matter anew.³ The second time around, subsequent to passage of identical legislation by both Houses of Congress,⁴ Mr. Reagan declined to veto a plant closing notification measure standing alone,⁵ allowing the bill to become law without his signature because political sentiment in Congress and public opinion promised to make a veto politically beneficial for the Democratic Presidential nominee Michael Dukakis.⁶ Moreover, a series of collective bargaining agreements fashioned by the United Auto Workers in the farm equipment and automobile industries in 1987 have provided workers with relatively comprehensive protection against collective dismissals.⁷

The new focus upon employment and the view that improper dismissals require regulation is appropriate. The Supreme Court has

2. *Senate Upholds Veto; New Trade Bill Sought*, N.Y. Times, June 9, 1988, at D1, col. 4.

3. *A Plant-Closings Bill Worth Passing*, N.Y. Times, June 23, 1988, at A22, col. 1; *Congress Drafts Revised Trade Bill*, N.Y. Times, June 24, 1988, at D1, col. 3; *G.O.P. Plan On Layoffs Is Defeated*, N.Y. Times, June 25, 1988, at 33, col. 3; *Republicans in Senate Fail To Block Plant-Closing Bill*, N.Y. Times, June 28, 1988, at C1, col. 1.

4. 134 CONG. REC. H5500, 5520 (daily ed. July 13, 1988); *House Passes Bill on Plant Closings by Vote of 286-136*, N.Y. Times, July 14, 1988, at A1, col. 1; *72 to 23 Senate Vote Approves Notice of Plant Closings*, N.Y. Times, July 7, 1988, at A1, col. 6.

5. Roberts, *President Decides Not to Veto Bill Requiring Notice of Plant Closings*, N.Y. Times, Aug. 3, 1988, at A1, col. 2.

6. Hume, Reagan, *Succumbing to Politics, Decides Against Vetoing Plant Closings Measure*, Wall St. J., Aug 3, 1988, at 3, col. 2.

7. *Caterpillar, UAW are Said to Agree Tentatively on Pact with Wage Freeze*, Wall St. J., July 7, 1986, at 7, col. 2; *Ford and UAW Agree on 3 Year Pact That Grants Broad Job Guarantees Except During Industry Slump*, Wall St. J., Sept. 18, 1987, at 3, col. 1; *GM Looks for UAW Contract Loopholes*, Wall St. J., Oct. 2, 1987, at 5, col. 2. However, the 1987 agreements do not establish new protection for workers in plants which are not closed but rather "idled" for a substantial period of time, i.e. years as well as months.

now recognized a property interest of the employee in the job he or she has held and the status derived from employee expectations.⁸ I reiterate what I said about this matter two years ago:

It seems to me that the starting point for evaluation of these issues is the realization that in a modern industrialized economy employment is central to one's existence and dignity. One's job provides not only income essential to the acquisition of the necessities of life, but also the opportunity to shape the aspirations of one's family, aspirations which are both moral and educational. Along with marital relations and religion, it is hard to think of what might be viewed as more vital in our society than the opportunity to work and retain one's employment status.⁹

I. DISCIPLINARY DISMISSALS: THE PROBLEM

The 1980's have witnessed a host of individual employer-employee controversies which have arisen both in and out of the organized labor sector of the economy. The rights of retirees, questions of privacy arising out of drug testing and alcohol abuse programs,¹⁰ and the Age Discrimination in Employment Act¹¹ claims have woven their way into the tort and contract theories now associated with wrongful discharge

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8. Skeptics should note that this principle was established by Justice Powell's opinion in the context of reverse discrimination litigation attacking the propriety of affirmative action in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). See generally W. Gould, *BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES* (1977).
 9. Gould, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U. L. REV. 885, 892; see also Culppeper v. Reynolds Metal Co., 421 F.2d 888, 891 (5th Cir. 1970); Woolley v. Hoffmann-LaRoche, Inc., 99 N.J. 284, 300, 491 A.2d 1257, 1266 (1985), modified, 101 N.J. 10, 499 A.2d 515 (1985).
 10. See *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), cert. denied, 107 S. Ct. 577 (1986) (holding that selection by lot for drug testing does not violate jockey's fourth amendment rights); *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987) (reversing lower court's decision prohibiting public school system's compulsory drug testing program without probable cause); *National Treasury Employees Union v. Raab*, 816 F.2d 170 (5th Cir. 1987) (holding that urinalysis for employees seeking promotion is reasonable search); *Brotherhood of Locomotive Engineers v. Burlington N.R.R.*, 838 F.2d 1087 (9th Cir. 1988) (holding that railroad's unilateral implementation of mandatory drug testing program is a "major dispute" within the meaning of the Railway Labor Act); see generally Comment, *Yellow Rows of Test Tubes: Due Process Constraints on Discharge of Public Employees Based on Drug Urinalysis Testing*, 135 U. PA. L. REV. 1623 (1987); Bible, *Employee Urine Testing and the Fourth Amendment*, 38 LAB. L.J. 611 (1987); and Joseph, *Fourth Amendment Implications of Public Sector Workplace Drug Testing*, 11 NOVA L. REV. 605 (1987).
 11. 29 U.S.C. §§ 621-634 (West 1985 & Supp. 1987); see also *Western Air Lines v. Criswell*, 472 U.S. 400 (1985) (affirming lower court's decision that Airline violated Age Discrimination in Employment Act (ADEA) by requiring mandatory retirement of flight engineers without showing age restriction is reasonably necessary to overriding interest in public safety); *Transworld Air Lines v. Thurston*, 469 U.S. 11 (1985) (airline's policy denying transfer to sixty year old pilots violates ADEA).

actions initiated throughout the country. While the wrongful discharge litigation appears to have given some protection to workers already covered by the grievance/arbitration machinery of the organized labor sector,¹² its principal impact to date has been upon the swelling non-union sector of employment.

A substantial majority of the workforce today is not protected by the provisions of collective bargaining agreements or the civil service regulations which provide comparable protection to public sector employees.¹³ Litigation in both federal and state courts, principally involving the application of state common law,¹⁴ is indicative of the growing aggressiveness and contentiousness displayed by a majority of private sector employees who enjoy none of the protections obtained by unions in both the private and public sectors.

Professor Jack Stieber of Michigan State University estimates that each year private sector employers terminate about three million employees for non-economic reasons.¹⁵ If the total workforce is approximately 100,000,000 persons, the total number of at-will employees is approximately 60,000,000 after subtracting the approximately 20,000,000 unionized employees and the approximately 20,000,000 civil service employees. The 3,000,000 at-will employees discharged annually statistic, according to Professor Stieber's estimate, is based upon calculations relating to the last available labor turnover rate of 4.6%

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12. See *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988); *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985). While *Lueck* holds that tort theories may be preempted by federal labor law's promotion of voluntarily negotiated grievance/arbitration machinery, *Lingle* preserves state court jurisdiction in cases involving the public policy exception to the principle that the contract of employment is terminable at will notwithstanding the availability of arbitration procedures in a collective bargaining agreement.
 13. See *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (holding that a teacher cannot be terminated because of constitutionally protected activity unless she would have been terminated in the absence of protected constitutional activity); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961) (holding that in absence of legislation, federal employment may be terminated at will of appointing officer). Since 1979, a federal employee may appeal disciplinary or performance discharges to the Merit System Protection Board under 5 U.S.C. § 7701(a) (West 1980 & Supp. 1987).
 14. See generally Gould, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMPLOYEE REL. L.J. 404 (1987) [hereinafter *A Case for Arbitration*]; Gould, *supra* note 9; Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983); Miller & Estes, *Recent Judicial Limitations on the Right to Discharge: A California Trilogy*, 16 U.C. DAVIS L. REV. 65 (1982); Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J.L. REF. 207 (1983); Gould, *Protection From Wrongful Dismissal*, N.Y. Times, Oct. 22, 1984, at A21, col. 3.
 15. J. Stieber, Address at Michigan State University on *Employment-At-Will: An Issue for the 1980's*, Daily Lab. Rep. (BNA) No. 2, at D-1 (Jan. 5, 1984).

published by the Bureau of Labor Statistics (BLS) in Washington, D.C.¹⁶

II. ECONOMIC OR COLLECTIVE DISMISSALS: THE PROBLEM

The problems spawned by economic dismissals, particularly during the recession of 1981 - 1983 are considerable. A recent BLS study which included persons twenty years of age and over who had at least three years of tenure, indicated that a total of 2,809,000 workers were displaced because of plant closings or relocations between January 1981 and January 1983. Between January 1981 and January 1986, a total of 10.8 million workers twenty years of age and over lost their jobs because of plant closings or employment cutbacks. Of those workers laid off, about 5.1 million had been at their jobs at least three years.¹⁷ More than one out of three older workers (fifty-five years of age or over) left the labor force after losing their jobs. The percentage of blacks and Hispanics who were re-employed as of January 1986 was ten percent lower than the comparable level of re-employment for whites.¹⁸ Compounding the problems of these displaced employees is the fact that only one-third of them received advance general notice and only about one-half received specific notice of the layoff.¹⁹ Blue collar workers in non-union establishments receive an average of only 2 days notice of plant closure or layoff.²⁰

These layoffs have generated responses at the legislative, judicial, and collective bargaining levels. First, as noted, the proliferation of wrongful discharge actions, which frequently arise out of dislocations attributable to mergers and other business re-arrangements, often involve the question of selection of employees to be dismissed. The allegation in such cases is that the employee-plaintiff has been selected for dismissal arbitrarily or discriminatorily.

The second response to these many displaced workers is through the collective bargaining process. Collective bargaining agreements negotiated by labor unions and employers have regularly covered the question of who is to be dismissed when economic circumstances or

16. *Current Labor Statistics*, 77 MONTHLY LAB. REV. 74, 86, table B-1 (1954).

17. Horvath, *The Pulse of Economic Change: Displaced Workers of 1981-85*, 110 MONTHLY LAB. REV. 3 (June 1987).

18. *Id.*

19. See Brown, *How Often Do Workers Receive Advance Notice of Layoffs?*, 110 MONTHLY LAB. REV. 13 (June 1987).

20. TECHNOLOGY AND EMPLOYMENT: INNOVATION AND GROWTH IN THE UNITED STATES ECONOMY 159 (Cyert & Mowery eds. 1987). However, another study provides different data. See Berenblein, *Company Programs to Ease the Impact of Shutdowns*, Report No. 878 (The Conference Board, New York, 1986). See generally, Addison & Portugal, *The Effect of Advance Notification of Plant Closings on Unemployment*, 41 Indus. & Lab. Rel. Rev. 3 (1987).

lack of demand for products and profitability necessitate such action. In America, the traditional collective bargaining response has been the "last hired - first fired" approach which requires that employees who are junior to others on the basis of working time accumulated in the company, plant, department, or job must make way first for more senior employees.

Another well accepted process is to provide so called "supplemental unemployment compensation" benefits for a displaced worker which, combined with unemployment compensation insurance available from the state will provide a worker with 90-95% of his regular wage. Such contracts have been negotiated for more than thirty years by a number of unions — particularly the industrial unions like the United Automobile Workers, the United Steelworkers, the United Rubber Workers, and the Oil, Chemical and Atomic Workers Union. These provisions have been expanded in some situations.²¹

In the 1980's the United Auto Workers (UAW) have negotiated "job banks" with the major automobile companies designed to place workers who are displaced because of technological innovation. In 1987, a series of collective bargaining agreements between the UAW and farm equipment manufacturers and automobile companies extended "job bank" provisions to layoffs attributable to reductions in volume without regard to the presence or absence of technological innovation.²²

Aside from addressing the question of employees to be dismissed through the "last hired - first fired" mechanism, collective bargaining agreements have provided for a variety of mechanisms designed to provide workers with job security. An increasing number of collective bargaining agreements provide for advance notice before layoff — 44% of the agreements in a 1980 BLS study provided for such.²³ This compares with 43.6% in 1978, 42.1% in 1976, 42.5% in 1975 and 41.8% in 1974.²⁴ Advance notice provisions are provided more often in contracts negotiated in manufacturing industries rather than non-manufacturing industries. Advance notice is also provided, although less frequently, before plant shutdowns or relocations. Of the agreements reviewed by BLS in 1980, 9.8% had such clauses; this represented a slight decline from comparable statistics in 1978.²⁵ According to a re-

21. See *Basic Patterns in Union Contracts* (BNA) 53:2 (1961), 53:3 (1971), 44 (1975), 37 (1979), 38 (1983), & 45 (1986).

22. Daily Lab. Rep. (BNA) No. 243, at A-5 (Dec. 13, 1986).

23. *Characteristics of Major Collective Bargaining Agreements*, Bureau of Lab. Statistics, Bull. 2095 at 107 (1981).

24. *Characteristics of Major Collective Bargaining Agreements*, Bureau of Lab. Statistics, Bull. 2065 at 100 (1980); Bull. 2013 at 78 (1979); Bull. 1957 at 89 (1977); Bull. 1888 at 73 (1975).

25. *Characteristics of Major Collective Bargaining Agreements*, Bureau of Lab. Statistics, Bull. 2095 at 107 (1981); Bull. 2065 at 100 (1980).

cent General Accounting Office study, that figure has now grown to 23%.²⁶ The United Rubber Workers was one of the first unions to negotiate the right to advance notification and now have provisions in most of their agreements providing for a six month notification for plant closings or layoffs that affect a specified percentage of the work force.²⁷ But another study demonstrates that blue collar workers in unionized establishments receive an average of two weeks notice.²⁸

Similarly, contract clauses providing for advance notice of technological change have appeared in 10.6% of the agreements included in the 1980 study. Again, there was a slight drop from 1978.²⁹ This contrasts rather sharply with the prevalence of contract clauses regulating subcontracting. A substantial percentage (58.1%) of agreements in the 1980 study had such provisions; this represented an upward swing from the 1970's.³⁰ Undoubtedly, the more immediate realization of job losses in the subcontracting situation accounts for greater use of such provisions.

A 1986 Bureau of National Affairs (BNA) study found that successorship clauses which impose some burden of assuming the bargaining relationship or contract clauses in mergers or business reorganizations appeared in 38% of the agreements.³¹ This represented a substantial increase from 22% in 1975.³² Accordingly, advance notice before a layoff as well as subcontracting and successorship clauses appear to be the most prevalent vehicles to protect employee job security.

Collective bargaining agreements traditionally have not imposed substantive limitations upon layoffs as opposed to disciplinary discharges where "just cause" contractual provisions place the burden of proof upon an employer that seeks to rid itself of a worker. But in the most regulated industries, such as railroads, trucking, airlines, and urban mass transportation, employees have received a considerable amount of protection where mergers, acquisitions, and closings are involved. The Washington Job Protection Agreement accomplished this objective through the collective bargaining process for workers in the

26. Rasky, *Battle Over Plant Closings*, N.Y. Times, Aug. 27, 1987, at D1, col. 3.

27. *Id.* at 28.

28. See *supra* note 19.

29. *Characteristics of Major Collective Bargaining Agreements*, Bureau of Lab. Statistics, Bull. 2095 at 107 (1981); Bull. 2065 at 100 (1980).

30. *Characteristics of Major Collective Bargaining Agreements*, Bureau of Lab. Statistics, Bull. 2095 at 104 (1981); Bull. 2065 at 97 (1980); Bull. 2013 at 75 (1979); Bull. 1957 at 86 (1977); Bull. 1888 at 70 (1975).

31. BNA, BASIC PATTERNS IN UNION CONTRACTS, (BNA) 6 (11th ed. 6th printing 1986).

32. BNA, BASIC PATTERNS IN UNION CONTRACTS, (BNA) 8 (8th ed. 3d printing 1975).

railroad industry.³³

The Agreement provided for payment of 60% of a displaced worker's pay for up to five years depending upon length of service, displacement allowances for five years for employees retained at lower pay, moving allowances, and severance pay based on length of service. Eventually, the agreements incorporating the Washington Job Protection Agreement were made enforceable under the Railway Labor Act. The Agreement was expanded by the Rail Passenger Service Act of 1970, which was, in part, designed to protect the interests of employees displaced by inter-city rail passenger service.

As noted above, some of this approach has now begun to emerge in the manufacturing industry, particularly with the UAW agreements with farm equipment and automobile manufacturers. But there are serious limitations surrounding these developments. The first limitation is that employees represented by unions and covered by collective agreements constitute only 16% or 17% of the work force — a figure which compares unfavorably with all other industrialized countries. Collective bargaining and its protection, thus, has no immediate significance for most American workers.

The second difficulty is that the law has played a somewhat limited role in filling the gaps of voluntarily negotiated agreements between labor and management in the collective dismissal arena, even in those minority of instances in which unions represent workers. Federal labor law has thus been of peripheral significance.

Illustrative of this trend is *First National Maintenance Corp. v. NLRB*,³⁴ a seven to two Supreme Court decision that an employer is not obliged to bargain about its decision to shut down operations despite the obvious job losses that can result. The employer is obliged to bargain about the effects of his decision, that is, retraining, relocation, and severance pay. Of course, if the decision has already been made or implemented some of the union's strength is eroded, a factor which Justice Blackmun noted in his majority opinion in *First National Maintenance* itself!

In the sixties and seventies, the Court gave short shrift to employee interests and job protection triggered by mergers, acquisitions, and the like where the union sought to impose both contractual and statutory duties and obligations upon successor employers.³⁵ But in

33. See generally Aaron, *Plant Closing: American and Comparative Perspectives*, 59 CHI.-J. L. REV. 941, 942-44 (1983).

34. 452 U.S. 666 (1981). See generally Gould, *supra* note 9, at 890-91, 915; Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1, 6-18 (1981); Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982); Skokell, *The Scope of Mandatory Bargaining: A Critique and a Proposal*, 40 INDUS. & LAB. REL. REV. 19 (1986).

35. In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964), the Court,

Fall River Dyeing & Finishing Corp. v. NLRB,³⁶ the Court noted that where employees were doing "essentially" the same work, under the same working conditions, and with "basically" "the same body of customers" the Board properly must take note of the fact that the employees will view their job situations as "essentially unaltered." Said Justice Blackmun for the Court:

This emphasis on the employees' perspective furthers the Act's policy of industrial peace. If the employees find themselves in essentially the same jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest.³⁷

Nevertheless, *Fall River Dyeing* protects only the employees' interest in union representation itself. Important as that is, none of the four major decisions of the Court³⁸ impose significant contractual obligations upon the new employer. And even where the union has negotiated a successorship clause, it may encounter substantial difficulties.³⁹

although noting that "[e]mployees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership," held that a corporate employer is bound to arbitrate with a union under a collective bargaining agreement between the union and another corporation which has merged with the employer. In two subsequent cases, however, the Court retreated from its position in *Wiley*. See *NLRB v. Burns Int'l Sec. Serv.*, 406 U.S. 272, 285-86 (1972) (in reversing lower court's decision that successor employer was bound by substantive terms of bargaining agreement between predecessor employer and the union, the Court distinguished *Wiley* by noting that (1) *Wiley* involved a section 301 suit to invoke an arbitration clause, not an unfair labor practice, and (2) *Wiley* was decided in the context of state law requiring the surviving corporation to assume obligations of the disappearing company in a merger); *Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel Employees Int'l Union*, 417 U.S. 249 (1974) (holding that employer who purchases substantially all of the assets of another employer is not bound by the substantive terms of the employer's bargaining agreement with the union).

36. 107 S. Ct. 2225 (1987).

37. *Id.* at 2236.

38. *Fall River Dyeing & Finishing Corp. v. NLRB*, 107 S. Ct. 2225 (1987); *Howard Johnson Co. v. Detroit Local Joint Executive Board, Hotel Employees Int'l Union*, 417 U.S. 249 (1974); *NLRB v. Burns Int'l Sec. Serv.*, 406 U.S. 272 (1972); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

39. See *Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel Employees Int'l Union*, 417 U.S. 249, 258 n.3 (1974) (dicta concerning remedy of injunction against sale of employer corporation on ground that sale was a breach of bargaining agreement's successorship provision). See also *Local Lodge No. 1266, Int'l Ass'n of Machinists v. Panoramic Corp.*, 668 F.2d 276, 277 n.1 (7th Cir. 1981) (holding that injunctive relief prohibiting proposed sale of assets by employer was available to union when collective bargaining agreements contained a successorship clause); see also *International Bhd. of Teamsters, Local Union 2707 v. Western Air Lines*, 813 F.2d 1359 (9th Cir. 1987), *vacated as moot*, 108 S. Ct. 53 (1987), (applying reasoning of *Panoramic* to Railway Labor Act); *Local 434 v. Sky View Terrace, Inc.*, 759 F.2d 1094 (3d Cir. 1985); *Lever Bros. v. International Chem. Workers Local 217*, 554 F.2d 115 (4th Cir. 1976); *UAW v. Goodyear Aerospace Corp.*, 656 F. Supp. 1283 (N.D. Ohio 1986); *General Drivers & Dairy Employees v.*

Thus, protection is frequently not afforded by either a collective bargaining agreement or by federal labor law. This has prompted increased discussion about plant closure legislation which would provide for notice and other forms of intervention. It may be that such focus is misallocated energy given the relative importance of ongoing disclosure obligations prior to a crisis type plant closing situation. Such disclosure requirements are similar to those imposed throughout much of Europe and accepted voluntarily by both sides of the bargaining table in Japan. The relatively weak provisions of the National Labor Relations Act which require an employer to "open its books" only when it pleads an inability to pay,⁴⁰ highlight the inadequacy of American labor law in this regard. But in any event, the debate is now about notification imposed through law.

Numerous objections have been put forward against the idea of plant closure notification legislation. The one heard most frequently is that it is in some way responsible for the lack of job creation and relatively (compared to America)⁴¹ high rate of unemployment in Europe. The difficulty with this assertion is that there is no proof to support it.⁴² Moreover, President Reagan's own Task Force has repudiated the idea in a report issued two years ago.⁴³

A second concern is that workers will sabotage products or lower productivity if they know that they are likely to lose their jobs. But a Conference Board study shows that quality and productivity actually increase subsequent to notification:

The productivity and quality improvements that occur appear to reflect the reaction of employees to the evidence that management is concerned about their welfare, the operation of counseling and job search programs that begin prior to layoff, the resolution of anxieties and uncertainties, and the desire of workers concerned about reemployment to demonstrate to new employers that the quality of the work force in the closed plant was high.⁴⁴

A report issued by the National Academy of Sciences, National Academy of Engineering and the Institute of Medicine, takes the posi-

Bake Rite Baking Co., 580 F. Supp. 426 (E.D. Wis. 1984); Local 381, Int'l Union of Operating Eng'rs v. Tosco, 823 F.2d 165 (8th Cir. 1987).

40. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). Compare Blanc-Jouvan, *Worker Involvement in Management Decisions in France*, 58 TUL. L. REV. 1332 (1984) (outlining French system of worker participation and comparing it with worker participation in the United States and other western European countries) and Gould, *Union Involvement in Employer Decision Making: Some Reflections on America and Europe*, 58 TUL. L. REV. 1322 (1984) (contrasting union participation in the United States and Europe).

41. Hershey, *Rate of Jobless at Lowest Point in Last 14 Years*, N.Y. Times, July 9, 1988, at 1, col. 6.

42. Flanagan, *Barriers to Economic Growth: A Transatlantic View* 175-229 (Lawrence & Schultze eds., The Brookings Institution, Washington, D.C. 1987).

43. Report of the Subcommittee on the Foreign Experience of the Secretary of Labor's Task Force on Economic Adjustment and Worker Dislocation (1986).

44. Cyert & Mowery, *supra* note 20, at 157.

tion that the "best time to undertake programs of job search assistance, counseling, and retraining for workers is prior to their displacement. In most cases, this can only occur with the cooperation of the employer — cooperation that includes advance notice to workers of impending plant shutdowns or large permanent layoffs."⁴⁵

III. THE THEORY OF WRONGFUL DISCHARGE: THE PROPOSED LEGISLATION

Essentially three theories have been developed to challenge employer dismissals of employees who, until approximately a decade ago, were regarded as terminable at will (i.e. that absent an explicit commitment by the employer to the contrary, they could be dismissed at any time, for any reason, unless a collective bargaining agreement⁴⁶ or civil service regulation covered the employee in question). However, in the 1980's there has been a sustained assault upon the terminable at will principle which has resulted in a number of exceptions to the doctrine. The reasons for the upswing in the number of lawsuits filed and the new found acceptance of employment theories by the courts are complex.⁴⁷ But a majority of jurisdictions now accept one or a number of the theories employed by plaintiffs.⁴⁸

45. *Id.* at 155.

46. See F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS*, 621-24 (1973) (when collective bargaining agreements provide for a "just cause" standard for arbitrating discharge and discipline disputes, the burden of proof is on the employer).

47. Among the reasons given for the increased protection of at-will employees are the decline of labor unions, displaced mid-level managers resulting from corporate mergers, increased public awareness of fairness and due process in the work place, the rise of reverse discrimination litigation, and the use of labor legislation in the United States. See Gould, *supra* note 9, at 895-99; *A Case for Arbitration*, *supra* note 14, at 409-10. Criticism of the employment-at-will doctrine in scholarly legal literature preceded these changes. See Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Williams, *Job Security and Unfair Dismissal*, 38 MOD. L. REV. 292 (1975); England, *Recent Developments in Wrongful Dismissal Laws and Some Pointers for Reform*, 16 ALBERTA L. REV. 470 (1979); Peck, *Some Kind of Hearing for Persons Discharged from Private Employment*, 16 SAN DIEGO L. REV. 313 (1979); Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L. J. 1 (1979); Comment, *Protecting the Private Sector At-Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WIS. L. REV. 777; Note, *Contracts — Employee's Discharge Motivated By Bad Faith, Malice, or Retaliation Constitutes a Breach of an Employment Contract Terminable At-Will*, 43 FORDHAM L. REV. 300 (1974); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974); Note, *Protecting the At Will Employee Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

48. For an exhaustive list of states providing some exception to the terminable-at-will doctrine, see Gould, *supra* note 9, at 887-89 n.6.

Led by the Supreme Courts of California,⁴⁹ Connecticut,⁵⁰ Oregon,⁵¹ and New Jersey,⁵² a variety of public policy theories have limited employer discretion when the reason for the dismissal was deemed to be inconsistent with public policy. The leading California decision involved an employee's allegation that he was dismissed because he refused to violate the state anti-trust law prohibiting a conspiracy to engage in price fixing. But some courts, including the Third Circuit Court of Appeals in Philadelphia⁵³ and the Supreme Court of Arizona⁵⁴ have fashioned far more expansive public policy theories.

The practical significance of the public policy cases is that they are rooted in tort. This means that punitive as well as compensatory damages for emotional harm and mental pain and suffering are available.

A second line of cases is based upon contract. Many of these cases impose a contractual obligation upon an employer because of representations made to employees about either procedural fairness or a substantive "just cause" standard for dismissal in the personnel handbook or other company materials made available to employees. The leader in this area was the Supreme Court of Michigan.⁵⁵ The New York Court of Appeals, while rejecting the public policy concept,⁵⁶ accepted the personnel manual as a basis for contract,⁵⁷ an idea followed by the Supreme Court of New Jersey⁵⁸ and others.⁵⁹ Meanwhile, a California lower court, while vague about the precise standard to be imposed upon the employer, accepted the view that an implied contract could be created in the employer-employee relationship when the course of conduct in the form of commendation, promotions, and so on could serve as a basis for such an implied contract.⁶⁰

The third avenue for employee action is the tort of good faith and

49. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

50. *Sheet's v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980).

51. *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975).

52. *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980).

53. *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983).

54. *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985).

55. *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980).

56. *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

57. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

58. *Woolley v. Hoffman-La Roche, Inc.*, 99 N.J. 284, 491 A.2d 1257 (1985).

59. See Note, *Employee Handbooks and Employment-At-Will Contracts*, 1985 DUKE L.J. 196; Comment, *Limiting the Employment-At-Will Rule: Enforcing Policy Manual Promises Through Unilateral Contract Analysis*, 16 SETON HALL L. REV. 465 (1986); Note, *The Employment Handbook as a Contractual Limitation on the Employment At Will Doctrine*, 31 VILL. L. REV. 335 (1986). Baskin, *The Value of Employee Handbook Disclaimers in Defending Post-Employment Litigation*, 38 LAB. L.J. 591 (1987).

60. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

fair dealing. This theory, predicated upon both contract and tort,⁶¹ also has been a basis for both punitive and compensatory damages.

These three lines of attack through the courts undoubtedly represent a more civilized regulation of the employment relationship than the terminable at will principle. Yet the cases have posed problems for employers, employees, and the public.

One of the major difficulties is that the availability of substantial punitive and compensatory awards before juries which are frequently hostile to employers with public visibility has meant excessive, arbitrary, and unpredictable judgments.⁶² From the employee's perspective, the cases have been almost equally troubling. The actions heard before juries are often financial trials by combat in which, even for those employees who retain lawyers under contingency fee arrangements, the cost of proceeding is considerable.⁶³ Moreover, most of the theories — particularly the public policy and contract theories, to the extent that they require longevity of service on the part of the employee — are simply not available to the average worker who is able to take his case to a private system of arbitration when covered by a collective bargaining agreement. And, in any event, employers have begun to counterattack by requiring applicants and employees to waive their right to challenge a dismissal utilizing the "just cause" theory at the time of hire or prior to the actual dispute⁶⁴ and have become more sophisticated in responding to the actions⁶⁵ — a phenomenon witnessed in the 1970's in connection with fair employment practices litigation. The public, of course, assumes the financial burden for these cases as they have raged through the state court systems like wildfire.

Twelve years ago, Professor Clyde Summers advocated comprehensive unfair dismissal legislation⁶⁶ such as that now utilized for the

61. See Note, *Defining Public Policy in At Will Dismissals*, 34 STAN. L. REV. 153, 158-61 (1981); *Cancellier v. Federated Dept. Stores*, 672 F.2d 1312 (9th Cir. 1982), cert. denied, 459 U.S. 859 (1982); *Foley v. Interactive Data Corp.*, 174 Cal. App. 3d 282, 219 Cal. Rptr. 886 (1985), review granted, 712 P.2d 891, 222 Cal. Rptr. 740 (1986); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

62. Careful analysis and evaluation of potential employer exposure and liability is contained in Jung & Harkness, *The Facts of Wrongful Discharge*, DAILY JOURNAL REPORT (Nov. 20, 1987).

63. See California State Bar Ad Hoc Committee on Termination At Will and Wrongful Discharge, *To Strike a New Balance: A Report of the Ad Hoc Committee on Termination At Will and Wrongful Discharge*, Labor & Employment L. News 6-7 (special edition) (Feb. 8, 1984) [hereinafter *Report*].

64. See *A Case for Arbitration*, supra note 14, at 419-20. However, Jung & Harkness, supra note 62, stress the point that personnel manuals and booklets are not a major liability concern to employers.

65. Delvecchio, *Big Awards Going to Fired Workers*, San Francisco Chronicle, Feb. 23, 1988, at A17, col. 5.

66. Summers, supra note 47. For some of the early discussion of the job as property in this country, see F. MEYERS, OWNERSHIP OF JOBS: A COMPARATIVE STUDY,

past ten years in Canada.⁶⁷ Although Montana has recently enacted a statute of limited scope and protection for employees,⁶⁸ and other jurisdictions have enacted so called whistleblower statutes,⁶⁹ no state has a comprehensive statute in this area. A New York City Bar Committee advocated a limited statute⁷⁰ and the California Ad Hoc Committee on Wrongful Discharge and Termination at Will proposed a more comprehensive statute⁷¹ but a combination of factors has thus far impeded development of legislation,⁷² notwithstanding the AFL-CIO Executive Council's strong support for such a bill.⁷³

Meanwhile, although the law of wrongful discharge and, most important, the juries have expanded the idea of a property right in jobs, the same is not true of litigation attacking plant closings. A factor in the unanimity of judicial rejection of employee claims in such circumstances was the availability of collective bargaining agreements in the cases litigated and the failure of unions to negotiate the protection which the plaintiffs sought from the courts.⁷⁴ Thus, both the limited

(1964); Green, *The Case for the Sit-Down Strike*, 90 THE NEW REPUBLIC 199 (1937).

67. 1978 Act to Amend the Canada Labor Code, 26-27 Can. Stat. Ch. 27, § 61.7 (1978).

68. MONT. CODE ANN. §§ 39-2-901 to 39-2-914 (1987).

69. CAL. LABOR CODE § 1102.5 (West Supp. 1987); CONN. GEN. STAT. ANN. § 31-51m (West Supp. 1988); ME. REV. STAT. ANN. tit. 26, §§ 831-840 (Supp. 1987); MICH. COMP. LAWS ANN. § 15.362 (West Supp. 1987); N.Y. LAB. LAW § 740 (McKinney Supp. 1988).

70. Committee on Labor and Employment Law, *At-Will Employment and the Problem of Unjust Dismissal*, 36 REC. A.B. CITY N.Y. 170 (1981).

71. *Report, supra* note 63, at 20-27.

72. *See A Case for Arbitration, supra* note 14, at 420-23.

73. AFL-CIO Executive Council, *Statement on the Employment-At-Will Doctrine*, 3 (Bal Harbour, Fla., Feb. 20, 1987) (on file with author). Labor unions may realize the following benefits from a wrongful discharge statute: Union representation of non-union employees at a dismissal hearing would effectively demonstrate to non-union employees the benefits of union representation; unions can use the dispute resolution machinery of a wrongful discharge statute in organizational drives; once non-union employees experience how beneficial a wrongful dismissal statute can be, they may desire union representation to bargain for a system more tailored to their needs; unions may also desire wrongful dismissal legislation to ensure that arbitration is binding and final in those jurisdictions which currently permit union employees, under certain circumstances, to by-pass the collectively bargained arbitration procedure and proceed to resolve their dismissal in state court. *See A Case for Arbitration, supra* note 14, at 417-19 and *supra* note 12.

74. *See Local 1330, United Steelworkers v. United States Steel*, 631 F.2d 1264 (6th Cir. 1980); *Charland v. Norge Div., Borg-Warner Corp.*, 407 F.2d 1062 (6th Cir. 1969), *cert. denied*, 395 U.S. 927 (1969); *Hass v. Darigold Dairy Prods. Co.*, 751 F.2d 1096 (9th Cir. 1985); *Cooper v. General Motors Corp.*, 651 F.2d 249 (5th Cir. 1981); *Baker v. Newspapers & Graphics Communication Union, Local 6*, 628 F.2d 156 (D.C. Cir. 1980); *Ekas v. Carling Nat'l Breweries, Inc.*, 602 F.2d 664 (4th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980); *Local 1251, UAW v. Robertshaw Controls Co.*, 405 F.2d 29 (2d Cir. 1968); *Zdanok v. Glidden Co.*, 288 F.2d 99 (2d Cir. 1961), *aff'd*, 370 U.S. 530 (1962); *Oddie v. Ross Gear & Tool Co.*, 305 F.2d 143 (6th Cir. 1962), *cert. denied*, 371 U.S. 941 (1962). Compare *Singer, The Reliance Interest in Prop-*

scope and content of collective bargaining and the unwillingness of the courts to impose limitations upon employer property interests outside the collective agreement have shifted the focus of activity to Congress and the state legislatures. Slowly and hesitantly the legislative branches of government have begun to respond to the mass or collective dismissal problem of which plant closings are the most dramatic and horrific manifestation.

IV. STATE PLANT CLOSURE LEGISLATION

Nine states have laws regulating plant closings or relocations: Connecticut, Hawaii, Maine, Maryland, Massachusetts, Michigan, South Carolina, Tennessee, and Wisconsin. An examination of some of these statutes reveals a broad spectrum of legislative responses to the problems caused by plant closings and relocations.⁷⁵

A. Summary of State Legislation

Maine. Enacted in 1980, the Maine legislation regulates both plant relocations and terminations. In a plant employing one hundred or more persons, if there is a removal of operations one hundred or more miles from its original location, an employer is required to pay a worker one week's severance pay for each year of employment in that establishment. An employer is not liable for severance pay when the relocation or termination of a covered establishment is "necessitated by physical calamity," when the employee is covered by an "express contract" providing for severance pay, when the employee accepts employment at the new location, or when the employee has been employed less than three years. There is an obligation to notify the state sixty days prior to a relocation and to give comparable notice to both employees and the municipality, if the business is relocating outside the state.⁷⁶

Maryland. Maryland enacted legislation in 1985 covering employers with at least fifty employees. The statute covers so called "reductions in operations" which include the "relocation of part of an employer's operation from one workplace to another existing or proposed site" and the "shutting down" of a workplace or portion of a

erty, 40 STAN. L. REV. 614 (1988) with F. O'CONNELL, PLANT CLOSINGS: WORKER RIGHTS, MANAGEMENT RIGHTS AND THE LAW (1986).

75. See Fine & Wall, *Plant Closing Laws: More Harmful Than Helpful?*, Legal Times, Oct. 28, 1985, at 11, col. 3; Folbre, Leighton & Roderick, *Plant Closings and Their Regulation in Maine, 1972-1982*, 37 INDUS. & LAB. REL. REV. 185 (1984); Harrison, *Plant Closures: Efforts to Cushion the Blow*, June MONTHLY LAB. REV. 41 (1984); *Report on Mass Layoffs and Plant Closings in 1986*, BUREAU OF LAB. STATISTICS (1987). See also HAW. REV. STAT. § 21-2946 (1987 Supp.); TENN. CODE ANN. § 50-1 (BNA SLL 4a).

76. ME. REV. STAT. ANN. tit. 26, § 625-B (Supp. 1987).

workplace that reduces the number of employees by at least 25% or fifteen employees, whichever is greater, over a three month period. The Maryland Secretary of Employment and Training is to develop guidelines governing to the appropriate time for advance notification and "whenever possible and appropriate" at least ninety days notice shall be given. Guidelines are to be established to address the appropriate continuation of benefits such as health insurance, severance pay, and pension plans that an employer should provide for employees who will be terminated due to a "reduction in operations" or a "specific mechanism" that the employer can utilize by seeking assistance from the state quick response program.⁷⁷

Connecticut. Connecticut enacted legislation in 1983 covering employers who have employed 100 or more persons within a twelve month period preceding a plant closing. The statute regulates both relocations and closings and provides that the existing group health insurance is to be paid for a period of 120 days or until such time as the employee becomes eligible for other group coverage. The statute does not cover employees who choose to be employed at the relocated facility. Any contractual provision which has been "arrived at through a collective bargaining process that contains provisions requiring the employer to pay for the continuation of existing group health insurance" in a relocation or plant closing context supersedes the requirements of the statute.⁷⁸

Massachusetts. Enacted in 1985, the Massachusetts legislation, like that of Maryland, provides for voluntary notification and requires the employer to "promptly report a plant closing to the state and it shall determine whether the closing will affect ninety percent of the employees through permanent separation within a six month period prior to the plant closing." The Massachusetts law also established a re-employment assistance program to provide counseling, placement, training, and any other services deemed necessary to employees terminated in plant closings which will lead to re-employment.⁷⁹

Michigan. Michigan enacted legislation in 1985 which addresses both relocation and plant closings. The Michigan Department of Labor is instructed to establish a program to assist in development of employee owned corporations which "may operate when an establishment is closing or transferring operations resulting in a loss of jobs and when a request for assistance is made by an affected individual or group of individuals." The Department is instructed to encourage employers considering a "decision to effect a closing or relocation of operations" to give notice of the decision "as early as possible" to both the Department, employees, and any labor organization which represents

77. MD. ANN. CODE art. 41A §§ 3-301 to 3-304 (Supp. 1987).

78. CONN. GEN. STAT. ANN. §§ 31-51n to 31-51o (West 1987 & Supp. 1988).

79. MASS. ANN. LAWS ch. 15A, §§ 71A to 71F (Law. Co-op. Supp. 1986).

the employees.⁸⁰

South Carolina. The South Carolina statute imposes an obligation upon the employer to provide notice in the event that the employee is required to give notice that he will quit. Such employers:

shall give notice to its employees of its purpose to quit work or shutdown by posting in each room of its building not less than two weeks in advance or the same length of time in advance as is required by it of its employees before they may quit work, a printed notice of such purpose, stating the date of the beginning of the shutdown or cessation from work and the approximate length of time the continuous shutdown is to continue.

These obligations are inapplicable where shutdown is caused by an unforeseen accident to machinery, or by "some act of God or the public enemy." An employer that fails to post the notice subjects itself to a fine not to exceed \$5,000, and is liable to each of its employees for "such damages" as they may suffer by reason of failure to give the notice.⁸¹

Wisconsin. Wisconsin enacted legislation in 1976 which requires any employer who employs 100 or more persons and who has plans for merger, liquidation, disposition, or relocation in or out of the state (resulting in a cessation of business operations affecting ten or more employees) to notify the State, any affected employee, any collective bargaining representative of any employee, and the clerk of any town, village, city, or county in which the affected place of employment is located. The notice must be in writing and given no later than sixty days prior to the date of the above described actions. Any employer that violates this provision is guilty of a misdemeanor and may be fined not more than fifty dollars for each employee who loses a job as result of the employer's termination of operations.⁸²

B. Constitutionality

The constitutionality of plant closure legislation at the state and local level has been an issue that has grown with the passage of new laws. The issue arises by virtue of both the Employee Retirement Income Security Act of 1974 (ERISA)⁸³ and the National Labor Relations Act. The argument relating to ERISA is that state legislation which provides benefits for dislocated workers is an employee benefit plan within the meaning of ERISA and, therefore, is preempted by virtue of the supremacy clause.

The second issue relates to the National Labor Relations Act, which has long been an object of considerable preemption litigation.⁸⁴

80. MICH. COMP. LAWS ANN. §§ 450.731-.738 (West Supp. 1987).

81. S.C. CODE ANN. § 41-1-40 (Law. Co-op. 1986).

82. WIS. STAT. ANN. § 109.07 (West Supp. 1986).

83. 29 U.S.C. §§ 1001-1461 (West 1985 & Supp. 1987).

84. See *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986); *Wisconsin*

The argument relating to the NLRA springs from the view that the subject matter addressed by plant closure legislation is regulated by the Act and, therefore, state regulation of the same subject matter is prohibited. Supreme Court decisions such as *First National Maintenance v. NLRB*,⁸⁵ dealing with the obligation of an employer to bargain about a decision to close or partially close its operations as a mandatory subject of bargaining within the meaning of the Act, indicate that plant closure legislation may also be a mandatory bargaining subject within the meaning of the Act.

In 1987 the Supreme Court had its first opportunity to consider this issue in *Fort Halifax Packing Co. v. Coyne*⁸⁶ and rejected preemption arguments regarding both statutes. In *Fort Halifax*, the Court was confronted with a Maine statute requiring employers to provide a one-time severance payment to employees in the event of a plant closing. The statute was found to apply equally to union and non-union employees and enterprises.

The Court also held that the Maine statute did not establish or require employer maintenance of employee benefit plans within the meaning of ERISA. Said Justice Brennan writing for the majority:

The purposes of ERISA's pre-emption provision make clear that the Maine statute in no way raises the types of concerns that prompted pre-emption. Congress intended pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation. It is for this reason that Congress pre-empted state laws relating to *plans*, rather than to simply *benefits*. Only a plan embodies a set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation.⁸⁷

The Court unanimously⁸⁸ rejected the view that the National Labor Relations Act's regulation of mandatory subjects of bargaining preempted social legislation. The Court analogized other decisions in which it had held that the establishment of minimum substantive labor standards was not inconsistent with the promotion of the collective bargaining process itself. Said the Court:

[T]he NLRA is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining . . . It is true that the Maine statute gives employees something for which they otherwise might have to bargain. That is true, however, with regard to any state law that substantively regulates employment conditions. Both employers and

Dept. of Indus., Labor & Human Relations v. Gould, Inc., 475 U.S. 282 (1986); *Brown v. Hotel & Restaurant Employees Int'l Union, Local 54*, 468 U.S. 491 (1984).

85. 425 U.S. 666 (1981).

86. 107 S. Ct. 2211 (1987).

87. *Id.* at 2217.

88. *Id.* at 2223 (the dissent was based upon the argument that the Maine statute was pre-empted by ERISA).

employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations.⁸⁹

A related issue that frequently arises by virtue of state plant closure legislation is the compatibility of notification or disclosure obligations with the NLRA's obligation to bargain. It might be contended that the obligation to notify more precisely resembles the form of the collective bargaining process itself rather than substantive terms involving the Maine severance statute presented in *Fort Halifax* — and the argument could be made even more effectively with regard to state law which provides for periodic or some other form of disclosure.

Notification is a more troublesome issue, given the holding of *First National Maintenance*. The effects which flow from the decision may be just as effective a regulation as statutory enactments. On the other hand, the fact that state legislation generally applies both in and out of the collective bargaining process and does not provide for exclusive focus upon the union role in notification where unions exist, may argue for the proposition that the state is providing protection for all employees in periods of economic distress — a concern which has only an indirect impact upon the collective bargaining process itself.

But the Court's holding in *NLRB v. Truitt Manufacturing Co.*,⁹⁰ addressing the circumstances under which a failure to disclose can be equated with an unlawful refusal to bargain, presents a question even farther over on the continuum leading to preemption than the issues involved with notification. Both state regulation and federal labor law relating to disclosure would be designed to allow for unions and employees to bargain, negotiate, or plan more intelligently than would otherwise be the case. And yet, when one looks at the House of Representatives Committee on Education and Labor Report on Plant Closure Legislation in 1985, it seems difficult to distinguish between federal and state regulations that impose a duty to consult as well. Said the committee:

The 'duty to consult' will give employees, through their unions, an opportunity to develop alternatives to a closure or cutback and a forum for bringing those alternatives before the employer. The employers will be obligated to provide information the union requests that would help in understanding the reasons for the employer's decision and in developing alternatives. The employer will be obligated to consult with the union in a good faith effort to find a way to avoid or modify the proposed closure or cutback.⁹¹

But the preemption issue on notice and the consultation inherent

89. *Id.* at 2222 (citations omitted).

90. 351 U.S. 149 (1956).

91. H.R. REP. NO. 336, 99th Cong., 1st Sess. 13 (1985). The 1987 version of legislation proposals was quite moderate, as is the 1988 statute. See, *Changes in the Plant Closings Provisions of the Trade Bill to address concerns raised by Senators and the business community*, July 6, 1987 (on file with the author).

in it, seem to have been resolved by new federal legislation discussed below.

V. FEDERAL PLANT CLOSURE LEGISLATION

On August 4, 1988, The Worker Adjustment Retraining Notification Act or the Plant Closing Notification Act of 1988 became effective, although its major feature will not become operative until six months after the Act becomes law. President Reagan, expressing continued opposition to its principles, allowed it to become law without his signature.⁹² The Act obliges employers who employ more than 100 employees to provide sixty days notice before a plant closing or mass layoff to representatives of the employees or, in the event that there is no representative, to "each affected employee" and to state and local government representatives. A plant closing is a shutdown which results in an employment loss at the single site of employment during any thirty day period for fifty or more employees, and a mass layoff notice obligation is triggered by loss of employment for at least 33% of the employees and at least fifty employees — or, in the alternative, 500 employees.

The statute is strewn with numerous limitations,⁹³ the first of which is the above mentioned 100 employee statutory coverage which means that approximately half of the work force is unprotected. Part time employees are excluded and are defined as employees who work less than twenty hours per week, or who have been employed for fewer than six of the twelve months preceding the date on which notice is required. Temporary employees hired with the "understanding" that their employment would be limited to a specific duration are not covered. Moreover, sixty days is an extraordinarily abbreviated period of time for notice and comes far too late to encourage work

92. Roberts, *President Decides Not to Veto Bill Requiring Notice of Plant Closings*, N.Y. Times, Aug. 3, 1988, at A1, col. 2; Thomas, *Reagan to Allow Plant Closing Bill to Become Law*, San Francisco Examiner, Aug. 2, 1988, at 1, col. 2.

93. In one respect, the 1988 Act may expand union and employee rights under the NLRA. Section 8(b) states that an employee of the seller at the time of the execution of the sale agreement becomes an employee of the purchaser "immediately after the effective date of the sale." Heretofore, federal labor law did not oblige the purchaser to hire the seller's employees under any circumstance. This change would then oblige purchasing employers to recognize unions since the rehiring of the seller's employees is a key factor where there was a pre-existing bargaining relationship. The 1988 Act mitigates the effects of decisions like *Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel Employees Int'l Union*, 417 U.S. 249 (1974) and *NLRB v. Burns Int'l Sec. Serv.*, 406 U.S. 272 (1972). Accordingly, the purchaser avoids such obligations only where (1) the seller provides proper 60 day notice, or (2) the seller offers transfers with no more than a 6 month hiatus, or break, in the employee's employment. For conflicting views in this area, see N.Y. Times, May 31, 1988, at E30, col. 3.

innovation, employee concessions, or other methods that the periodic sharing of sales and profit information, for instance, might promote.

Another limitation consisting of the reduction of the notification period and substitution of notice which is "practicable" is provided for where (1) the employer had to shut down before the sixty day period and was "actively" seeking capital or business which would have enabled the employer to avoid or postpone the shutdown and had a good faith belief that the notice would have precluded the needed capital or business; (2) where a premature closing, i.e. before sixty days, was caused by business circumstances that were "not reasonably foreseeable" at the time that notice would have been required; (3) where the failure to give notice was attributable to a "natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States;" or (4) the closing or layoff "constitutes" a strike or a lockout "not intended to evade the requirements of the Act." Notice is not required where an employer permanently replaces an economic striker, although the Act is careful to state that decisions such as *NLRB v. MacKay*⁹⁴ which have established the proposition that an employer can permanently replace strikers with strikebreakers are not affected. And in sharp contrast to European practice and some of the state laws in the United States, the Act does not provide for severance pay or other forms of compensation beyond unemployment compensation and welfare which might be available — merely notice to the private parties and public bodies defined by the statute.

The Act provides for civil actions against employers that violate the notice provisions and back pay for each day of violation at a rate of compensation not higher than the average regular rate received by the employee during the last three years of the employee's employment, or the final regular rate received by such employee. A civil penalty of not more than \$500 for each day of violation is provided in connection with failure to notify a unit of local government. No injunction is available. A good faith or reasonable grounds for believing that the "act or omission" was not a violation of the act is provided — although it is difficult to see where this would apply given the numerous exceptions referred to above. The statute is intended to provide rights and remedies in addition to and not in lieu of other contractual or statutory rights and remedies established either by collective bargaining agreements or state legislation.

94. 304 U.S. 333 (1930). Section 4 of the 1988 Act specifically disavows any intent to validate or invalidate any judicial or administrative decision on the permanent strike replacement issue. It would seem that the 1988 Act makes *MacKay* more vulnerable to reexamination and challenge. See generally Gould, *Vital Issues and New Directions in Labor-Management Relations: "The Permanent Replacement of Strikers,"* Speech for United States Dept. of Labor Conference (Mar. 17, 1988) (on file with author).

Quite obviously, the statute is limited and the exceptions to the notice obligation are quite numerous. Nevertheless, it is symbolic in a positive as well as a negative sense.⁹⁵ It is quite possible that amendments will be enacted now that the precedent for such a statute has been established. This is why President Reagan opposed the law, despite its limitations, with such vigor. The refusal to sign the law rather than to veto it was simply a bow to the inevitable political reality.⁹⁶

VI. OBLIGATIONS UNDER INTERNATIONAL LABOR LAW

In 1963, the International Labor Organization (ILO) first took initiative on the job termination issue through the issuance of a Recommendation, which the member states did not ratify. Only in 1982, subsequent to European labor law described in more detail below, did the ILO issue a Convention. The 1982 Convention, which has not been ratified by the United States⁹⁷, provides for the right of employees' representatives to consult with employers about procedures to minimize dismissals and to mitigate adverse effects "as early as possible."⁹⁸ It also permits terminations that have been made for "valid reasons" and provides that employees receive a "reasonable period of notice or compensation in lieu thereof" as well as separation pay.

The employer must provide workers' representatives with information concerning the reasons for dismissals in "good time" and the employer is required to notify governmental authorities. While most American states have accepted one of the contract or tort theories to limit an employer's right to dismiss employees in the non-union sector, and employers who have negotiated collective bargaining agreements have generally promised not to dismiss employees except for "just cause," it cannot be said that non-union employees in this country have the explicit right to be substantively protected against dismissal when it is done for an invalid reason. Those employees in states which do not have plant closure legislation do not have the right to consult with employers through employee representatives or to receive notice and severance pay. Indeed, even a majority of those employees covered by collective bargaining agreements will not have such rights as a matter of contract. The limited scope of state law and

95. See Gould, *Plant Closing Law May Herald Better Reforms*, San Jose Mercury News, Aug. 4, 1988, at B7, col. 3.

96. Hume, *Succumbing to Politics, Reagan Decides Against Vetoing Plant Closing Measure*, Wall St. J., Aug. 3, 1988, at 3, col. 5; Roberts, *Reagan is Pressed on Plant Closings*, N.Y. Times, Jul. 27, 1988, at A1, col. 1.

97. However, the Convention has been ratified by nine countries: Cameroon, Cyprus, Malawi, Niger, Spain, Sweden, Venezuela, Yugoslavia and Zaire.

98. See International Labour Office, Official Bull., Vol. 65, Ser. A. at 72 (1982).

the fact that adequate notice is infrequently provided to employees are reasons that Congressional action is an urgent priority.

In addition to the ILO 1982 Convention, the European Economic Community has been considering the so called Vredeling proposal. The Vredeling proposal requires multi-national corporations, including European subsidiaries of American corporations doing business with the European Economic Community, to consult with employees' representatives before adopting policies which might affect employment conditions. Moreover, Vredeling, along with OECD guidelines,⁹⁹ requires multi-national corporations to provide employees annually with information regarding both the corporation's current financial situation and its future plans and prospects. One can easily see that even for those employees who are represented by unions and subject to the National Labor Relations Act the ambit of *Truitt* is much more limited in scope. Federal and state legislation, as well as congressional bills which have been seriously considered, do not seem to venture into this realm.

VII. RELEVANT WESTERN EUROPEAN LAW AND EXPERIENCE: THE SUBSTANTIVE STANDARD FOR DISMISSAL

Western European legislation antedates the 1982 ILO Convention and provides for some form of substantive limitation upon an employer's right to dismiss an employee both in and out of the plant closing or collective dismissal context. Litigation arising under such legislation is heard by tripartite courts or tribunals — consisting of labor, management, and public representatives — in Britain, France, Sweden, and Germany. Courts of general jurisdiction hear such disputes in Japan, Italy, and the Netherlands. All of the specialized tribunals promote the peaceable mediation of dismissals prior to the necessity for formal procedures.

In Britain and Sweden "unfair" dismissals or those which cannot be justified on "objective" grounds are prohibited. In France, those dismissals which are not "just and reasonable" are outlawed. In Germany dismissals may only be instituted where they are "socially warranted." In Japan, where there is no unfair dismissal legislation as such, the Civil Code prohibits both disciplinary and economic dismissals which constitute an "abuse" of power. Moreover, in Japan, by virtue of informal understandings not generally reflected in collective bargaining agreements themselves, what is frequently referred to as

99. Blanpain, *Transnational Regulation of the Labor Relations of Multinational Enterprises*, 58 CHI.-J. KENT L. REV. 909, 940 (1982). For text of the Vredeling Proposal, see Monty, DOCUMENTATION IN THE VREDELING PROPOSAL 57-219 (1983); See generally Yemin, *Comparative Survey in Workforce Reduction in Undertaking* (International Labor Office, 1982).

"lifetime" employment or permanent employment is not given to some employees in major companies until they are in their late fifties.¹⁰⁰

All of this contrasts with the much more limited protection available in the United States. As noted above, the state courts have fashioned a common law of contract and tort which limits the employers' ability to dismiss employees in both an individual disciplinary and collective economic context. Collective bargaining agreements sometimes provide limitations in the organized sector although the National Labor Relations Act, as interpreted by the Court, has not been generally helpful.

Three major problems have emerged in Europe which have some relevance to the American situation. The first relates to remedies. French law provides for reinstatement in limited circumstances — e.g., when a union representative is dismissed. Swedish law, on the other hand, disavows reinstatement and provides for only compensation. Sweden requires that a worker remain on the job while his dismissal claim is pending before the Labor Court and thus places the burden on the employer while the matter is being contested — a procedure remarkably similar to the one negotiated recently by the United Steelworkers.

In Britain and Germany, reinstatement is available, but its use is extraordinarily infrequent. Indeed, some writers have taken a particularly downcast view of the state of German labor law in relation to remedies:

In four out of five successfully completed proceedings, the parties agreed within a judicial or extra judicial settlement on continuation of the employment relationship. The same goal was achieved in only a fifth of the successful cases, i.e. in 1.7 per cent of all lawsuits, by court decision. If the number of the actually continued employment relationships is viewed in relation to the whole number of dismissals at the initiative of the employer in 1978, the rate of efficiency deteriorates drastically to only 0.7 per cent. That is, of every 10,000 dismissed employees, seventy-one are continued in employment after having invoked the Law of Protection from Dismissal. For the overwhelming majority of dismissed employees this law does not seem to play any practical part.¹⁰¹

In Britain, this appears to be the case because compensation, which is available to an employee in lieu of reinstatement even when the latter is ordered, is too low.¹⁰² The inadequacy of compensation is a complaint which is heard throughout Western Europe.

A very different situation prevails in America. While substantial

100. See generally W. GOULD, *JAPAN'S RESHAPING OF AMERICAN LABOR LAW* (1984).

101. Dose — Digenopoulos & Holand, *Dismissal of Employees in the Federal Republic of Germany*, 48 MOD. L. REV. 539, 559 (1985) (citation omitted).

102. See L. DICKENS, M. JONES, B. WEEKES & M. HART, *DISMISSED: A STUDY OF UNFAIR DISMISSAL AND THE INDUSTRIAL TRIBUNAL SYSTEM* 107-39 (1985). See also *Industrial Tribunals, A Report by Justice* (1987).

punitive and compensatory damages are available in American wrongful discharge actions, the fact is that reinstatement is generally not part of the court's remedy because of the hostility of common law toward an equitable order that would compel personal services and would require involvement in a personal relationship. One of the major reasons for advocacy of wrongful discharge legislation and arbitration as a forum in the United States is that arbitrators, like the National Labor Relations Board,¹⁰³ frequently provide for reinstatement as a remedy.

Another problem that has developed with unfair labor practice legislation is the demand in all Western European countries to exclude more small employers from statutory coverage and to make more difficult employee eligibility tests for access to a tribunal. Germany excludes coverage to employees who are employed for six months or less.¹⁰⁴ Britain made the employee's eligibility two years.¹⁰⁵ Sweden has enacted similar legislation.¹⁰⁶ The American case law, insofar as it is predicated upon implied contracts and the covenant of good faith and fair dealing seems designed, by its rationale, to exclude employees who do not possess similar longevity.

A. Union Influence Prior to the Decision

European labor legislation addresses itself to the matter of assuring or promoting union and worker involvement in employer decision making in a number of ways. In the first instance, although the Vredeling directive precludes union and works council access to employer information which is confidential, both Germany and Sweden have legislated union works council access to such matters. Both countries have either developed or fostered the growth of institutions and practices which will allow for effective employee participation before employer decisions are made.

Sweden has provided that local clubs, or local unions as Americans would call them, are to be the recipients of such information. Presumably, the theory of the Swedish Joint Regulation Act of 1976 which provides for such access is that such organizations will be less tempted to reveal important information to an employer's competitors when the national union also has members, but the local does not. Ger-

103. See Gould, *supra* note 9, at 912; Trudeau, *Statutory Protection Against Unjust Dismissal for Unorganized Workers*, (Harvard Law School, April 1985) (employer resistance to arbitral award by frequently seeking judicial review).

104. See Weiss, *Individual Employment Rights Focusing on Job Security in the Federal Republic of Germany*, 67 NEB. L. REV. 82 (1988).

105. Employment Protection (Consolidation) Act, 1978, as Amended 2 Eliz., Chap. 44, § 64A.

106. Act Concerning Security of Employment in Sweden, as amended, (1984) Sections 4 & 5. See R. FAHLBECK, *LABOUR LAW IN SWEDEN* 39-47 (1981).

many, like France¹⁰⁷, has statutorily created works councils which must be consulted about dismissals and other management decisions before they are instituted.

Union and employee involvement in dismissal decisions and plant closings is also provided through representation on the supervisory board in Germany and Sweden. This is a less important feature of the industrial relations law system in Sweden where minority representation has been established. But it has become a key matter of debate in Germany where parity between unions or worker representatives and employer representatives, as provided for in coal and steel, was not obtained through the 1976 Co-Determination Act,¹⁰⁸ although near parity was provided in most of the rest of the private sector.¹⁰⁹

B. Notification and Consultation of Workers and Government Representatives

In Germany the Works Constitution Act requires employers to inform the works council of a dismissal and to take the same initiative with the Regional Labor Office regarding mass dismissals which might take place during a twelve month period. The dismissal must be "socially warranted" which often requires the employer to justify the dismissal of an individual employee on grounds of social circumstances, family obligations, seniority, and so on.

But in countries like Britain, for instance, the dismissal which is economic in origin cannot be challenged under the labor law although severance and notification are provided. France took an intermediate position until 1986 by involving its administrative authorities in exploring the possibility of alternatives to closure. Until 1986 the French authorities could hold up the dismissal pending approval, a provision

107. See generally Glendon, *French Labor Law Reform 1982-1983: The Struggle for Collective Bargaining*, 32 AM. J. COMP. L. 449 (Summer 1984); Plasencia *Employment at Will: The French Experience as a Basis for Reform*, 9 COMP. LAB. L.J. 294 (1988).

108. Act Respecting Workers' Co-Determination (Co-Determination Act), Bundesgesetzblatt, Teil 1, Pt 1, No. 51, at 1153 (1976).

109. West German workers have a voice in decisions affecting their worklife at four different levels: the government level where workers' representatives nominated by the unions sit on various governmental bodies; the enterprise level where workers' representatives participate in the management of an enterprise on supervisory boards; industry level where employees' unions negotiate collective agreements; and the shop level where works councils represent employees in establishing shop agreements and resolving disputes at the plant level (representatives of works councils, although often submitted for election by unions, act independently of the unions and consider themselves as representatives of workers at the shop level). See Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. CONTEMP. L. 367, 368-71 (1980); Gould, *Northern Europe's Labor Laboratory*, THE NATION 210 (1976).

which has been repealed by the Chirac Government which resigned this past spring.

Britain, through its Employment Protection Act of 1975, has mirrored the notice and consultation provisions of German law. But the British statute contains an escape clause through which the statute's notification provisions are declared inoperable when there are "special circumstances which render it not reasonably practicable for the employer to comply with any of the statutory requirements."¹¹⁰ In such circumstances the employer need take only those initiatives toward compliance which are "reasonably practicable" in the "circumstances."¹¹¹ States Professor Anderman:

The courts have been rather generous in their interpretation of this escape clause. Although gradual insolvency has not been sufficient, sudden financial disaster, such as insolvency due to withdrawal of a perspective purchaser, and a bank calling in a receiver or a failure to procure a government loan have been held to be special circumstances justifying no consultation by the employer.¹¹²

One difficulty with the plant closure legislation, like unfair dismissal legislation, is the ineffectiveness of the remedy. There has been no litigation in Britain about the Employment Protection Act's plant closure provisions and it appears as though employers that have found the notice provisions too burdensome and considered the escape clause unavailable have simply paid the workers in lieu of notice — what the courts would have ordered them to do in any event. Indeed, in the mid 1970's in Germany, many of the employers in automobile and other manufacturing provided severance pay benefits in lieu of compliance with the notice provisions.

The ability to escape the statute's procedures in Britain, Germany, or France defeats one of the basic purposes of the legislation — the development of social plans, as the Germans call them, devised to provide for employment opportunities, training, or assistance in the wake of the dislocation triggered by a plant closing.

VIII. CONCLUSION

The 1980's have produced a body of common law in most jurisdictions at the state level as well as plant closure legislation in a more limited number of jurisdictions. America is thus taking its first steps forward in terrain long since furrowed by Europe. The problems of effective administration of the legislation, particularly in the remedy area, have proved considerable in Europe and, notwithstanding our substantially different tradition in many aspects of labor law, this

110. Anderman, *United Kingdom in Restructuring Labour in the Enterprise*, 15 BULL. COMP. LAB. REL. 121, 125 (1986).

111. *Id.*

112. *Id.*

country can learn from the strength as well as the limitations of the European experience. While this country has long accepted reinstatement as a matter of course under the National Labor Relations Act and arbitration, the European view seems to have persisted in the wrongful dismissal arena. Unless the labor movement becomes deeply involved in the administration of unfair dismissal legislation as well as its development, the absence of a monitor at the work place could erode the most carefully planned reinstatement procedures.

But the important point is that America is belatedly accepting some property characteristics in the job outside the unionized and public sectors. Plant closure legislation, enacted in a minority of the states, may constitute a part of the 1988 political debate and ultimately find its way into federal law. Governor Michael Dukakis of Massachusetts, the 1988 Democratic nominee for President, supported comprehensive plant closure legislation and stated that it would be enacted during the first ninety days of his administration in 1989 before it became law. Because of the problems bound up with wrongful discharge litigation, new legislation should be enacted here as well although activity at the state level may preclude any federal effort.

America, now hobbled by its alarmingly low rate of unionization, is catching up in the job security area. The Plant Closing Notification Act of 1988 will surely impel both Congress and the state legislatures to review carefully the need for federal and state protection of employees' jobs.¹¹³ The country still has far to go.

113. See Gould, *Plant Closing Law May Herald Better Reforms*, San Jose Mercury News, Aug. 4, 1988, at B7, col. 3.